No. 89-1879

In the Supreme Court of the United States

OCTOBER TERM, 1990

SUMMIT HEALTH, LTD., ET AL., PETITIONERS

v.

SIMON J. PINHAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether in this antitrust case respondent has shown a sufficient nexus with interstate commerce to withstand a motion to dismiss on the pleadings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases--Continued: Page

Cases--Continued: Page

Statutes:

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INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. The question presented by this case—concerning the scope of the "commerce" requirement under the Sherman Act—directly affects that enforcement responsibility, since as a plaintiff in civil and criminal cases, the government is required to show that an activity is "in commerce" or affects commerce. Moreover, because the federal government regulates many aspects of the health care industry and disburses substantial funds to participants in that industry, anticompetitive activity in the health-care sector of the

economy could significantly affect existing federal programs.

STATEMENT

1. Respondent Simon J. Pinhas, M.D., is an eye physician and ophthalmological surgeon. Compl. ¶ 5; Pet. App. A5, A37.[1] In October 1981, he became a member of the medical staff at petitioner Midway Hospital Medical Center (Midway) in Los Angeles, California, and thereafter performed more ophthalmological operations than any of his colleagues. Compl. ¶¶ 5, 22; Pet. App. A5, A42. At that time, Midway required the use of assistant surgeons during eye surgery. In February 1986, however, Medicare elected to stop reimbursing physicians for the services of assistants. Respondent and several other surgeons at Midway asked the hospital to eliminate the required use of assistants; respondent explained that, in his own case, eliminating the requirement would save him as much as $60,000 per year. Compl. ¶¶ 22-26; Pet. App. A5-A6, A42-A43.

Midway declined to revoke the requirement. Instead, the hospital offered respondent what he regarded as a "sham" contract. Under it, respondent would be paid $60,000 per year for consulting services that he would not be expected to perform. Respondent rejected the proposal. Compl. ¶¶ 27-28; Pet. App. A6, A44.

Allegedly unhappy with respondent's refusal to accept the contract, petitioners thereafter initiated peer review proceedings against him. Compl. ¶ 29; Pet. App. A6, A45. On April 13, 1987, Midway summarily suspended

[1] Because this case comes to the Court from the granting of a motion to dismiss on the pleadings, the facts alleged in the complaint must be taken as true. We accordingly describe pertinent allegations of the complaint in some detail.

respondent. Compl. ¶ 29; Pet. App. A6-A7, A45.[2] One week later, the Midway Executive Committee met and, after permitting respondent to make a statement, upheld the suspension and recommended that respondent's staff privileges at Midway be terminated. Compl. ¶¶ 31-32; Pet. App. A7, A45-A46. Thereafter, the Midway Judicial Review Committee conducted hearings and issued a report, upholding only one of the seven charges against respondent and recommending probationary reinstatement with special conditions. Compl. ¶ 74; Pet. App. A7, A56. On further appeal, the Governing Board of the hospital in February 1988 affirmed the Committee's decision, but imposed more stringent conditions on his practice. Pet. App. A7. On May 17, 1989, the Superior Court of the State of California denied respondent's request for further relief. *Id.* at A8, A30-A35.

2. In July 1987, while the administrative proceedings were still pending, respondent brought the present action in the United States District Court for the Central District of California, claiming, among other things, that petitioners had conspired to violate Section 1 of the Sherman Act, 15 U.S.C. 1. See Compl. ¶¶ 120-126; Pet. App. A74-A76. In support of that claim, respondent alleged that he was "engaged in the practice of medicine and surgery * * * and as such [was] engaged in interstate commerce." Compl. ¶ 5; Pet. App. A37. He made similar claims about petitioners, including Midway, the Midway medical staff, and Summit Health Ltd., Midway's parent corporation – which, respondent alleged, "owns and operates approximately 19 hospitals and 49 nursing home facilities in California, Arizona, Colorado, Oregon, Iowa,

[2] In its letter of suspension, the hospital stated that a medical staff review had raised questions about various aspects of respondent's practice, including the appropriateness of his surgical procedures. Compl. ¶ 29; Pet. App. A6-A7, A45.

Washington, Texas and Saudi Arabia." Compl. ¶¶ 6-19; Pet. App. A37-A41. Respondent alleged that by instituting an unwarranted peer review proceeding against him, petitioners had effected an unlawful boycott, intended to drive him out of business and provide petitioners with a larger share of the eye care and ophthalmic surgery market in Los Angeles. Compl. ¶¶ 122-123; Pet. App. A74. Respondent further claimed that petitioners had prepared certain adverse reports concerning the review proceedings; once disseminated, he alleged, those reports would preclude respondent from practicing medicine in California, "if not the United States." Compl. ¶ 124; Pet. App. A74-A75.

3. On October 2, 1987, the district court granted petitioners' motion to dismiss the complaint. See Pet. App. A28-A29. With respect to the Sherman Act claim, the court found that respondent's allegations were barred by the state action doctrine. *Id.* at A9. The court did not reach the question whether respondent had alleged a sufficient nexus to interstate commerce.

The court of appeals affirmed in part and reversed in part. Pet. App. A1-A27. After rejecting petitioners' state action defense (*id.* at A16), the court proceeded to find a sufficient nexus with interstate commerce to sustain the Sherman Act cause of action. The court explained that, under the Sherman Act, respondent was required to " 'identify a relevant aspect of interstate commerce and then show "as a matter of practical economics" that the Hospital's activities have a "not insubstantial effect on the interstate commerce involved." ' " *Id.* at A19. The court concluded that respondent had made such a showing. In particular, the court stated, petitioners' peer-review proceedings had an "effect on interstate commerce * * * that can hardly be disputed," in that they "affect the entire staff at Midway and thus affect the hospital's interstate

commerce." *Id.* at A20. Relying on *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980), the court rejected petitioners' contention that respondent was required to "make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working." Pet. App. A19-A20.

SUMMARY OF ARGUMENT

A. To state a claim under the Sherman Act, a plaintiff need not allege a nexus between interstate commerce and the challenged anticompetitive conduct itself. This Court's decision in *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), expressly rejected any such requirement, and petitioners' contrary contention cannot be squared with the plain terms of that case. What is more, petitioners' narrow conception of the commerce requirement would unjustifiably burden antitrust litigation, thereby impairing the proper and effective enforcement of the antitrust laws.

Instead, it is sufficient for a plaintiff to show that the line of business at issue, if not the challenged conduct itself, affects commerce. Still more broadly, we believe that, in an appropriate case, a plaintiff may sustain a Sherman Act claim where the class of economic activities that includes the line of business at issue affects interstate commerce. This broader view is rooted in the Court's Commerce Clause decisions, as well as the Court's related recognition that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' " *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945).

B. Under an appropriate construction of the commerce requirement—either the "class of activities" approach or the "line of business" approach—respondent's showing was sufficient to withstand a motion to dismiss.

Respondent identified a class of activities—the provision of ophthalmological services—out of which the challenged boycott arose. That class of activities, the complaint asserted, affects interstate commerce in several respects: physicians and hospitals receive reimbursement through federal Medicare payments (Pet. App. A43); individual hospitals are often constituents of larger, interstate operations (*id.* at A37); and reports concerning peer review proceedings are routinely distributed across state lines, thereby affecting the availability of employment opportunities on a nationwide basis (*id.* at A74-A75). Moreover, in their brief in the court of appeals, petitioners appear to have acknowledged that their line of business receives a certain number of out-of-state patients, as well as out-of-state revenues. C.A. Br. 25. See also Pet. App. A19 n.6. On that record, the court of appeals correctly concluded that respondent had shown a sufficient nexus with interstate commerce to withstand the motion to dismiss.

ARGUMENT

RESPONDENT HAS ESTABLISHED A SUFFICIENT NEXUS WITH INTERSTATE COMMERCE UNDER THE SHERMAN ACT TO WITHSTAND A MOTION TO DISMISS

A. Under The Sherman Act, A Plaintiff Need Not Allege A Nexus Between Interstate Commerce And The Challenged Anticompetitive Conduct Itself

1. The Court's decisions have long "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power." *Hospital Bldg. Co.* v. *Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976). For example, the Court has held that the Act applies not only to activities that are themselves in interstate commerce, but also "to local activities which, although not themselves within the flow of interstate commerce, substantially affect interstate commerce." *United States* v. *American*

Bldg. Maintenance Indus., 422 U.S. 271, 278 (1975). Accord *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948).

On that basis, the Sherman Act reaches liquor wholesalers in Oklahoma who divide markets by territories and brands, and thereby reduce competition, increase prices, and affect interstate sales. *Burke* v. *Ford*, 389 U.S. 320, 322 (1967). The Act extends as well to the intrastate fixing of attorneys' fees, because attorneys' services are related to the procuring of mortgage loans, and many mortgage loans are procured through interstate commerce. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783-785 (1975). And the Act extends to attempts to monopolize intrastate provision of hospital services, because hospitals buy drugs and receive insurance payments through the channels of interstate commerce. *Hospital Bldg. Co.* v. *Trustees of Rex Hosp.*, 425 U.S. 738 (1976).

Under that broad view of the Sherman Act, the Court has rejected the proposition—urged by petitioners in this case (Pet. 3)—that plaintiffs must show a nexus between interstate commerce and the challenged anticompetitive activity in particular. The Court's decision in *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, *supra*, makes that point clearly. The petitioners in *McLain* brought an antitrust action against several New Orleans real estate brokers, claiming that the brokers had conspired to fix brokerage fees on the sales of residential houses. The brokers moved to dismiss the complaint on the ground that there was not a sufficient nexus with interstate commerce. Rejecting that contention, the Court held that it was sufficient to allege that the defendants' general brokerage activity affected interstate commerce, even if

the challenged conspiracy itself was entirely intrastate. As the Court put the matter (444 U.S. at 242-243):

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful.

Applying that principle, the Court concluded that the plaintiffs had alleged a sufficient nexus to interstate commerce to withstand a motion to dismiss. The Court focused not on the challenged conspiracy, or even on the setting of brokerage fees in general, but rather on the still more general "function of * * * real estate brokers"—"to bring the buyer and seller together on agreeable terms." *Id.* at 246. "Brokerage activities," the Court explained, "necessarily affect both the frequency and the terms of residential sales transactions"; and "whatever stimulates or retards the volume of residential sales * * * affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce." *Ibid.* Rejecting the motion to dismiss, the Court held that "petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce." *Ibid.*

2. While two circuits have recognized the broad sweep of the *McLain* case,[1] most courts of appeals have read the

[1] See, *e.g.*, *Western Waste Serv. Sys.* v. *Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.) (Kennedy, J.) (in light of *McLain*, it is sufficient that the "defendant's business activities, independent of the violations, affected interstate commerce"), cert. denied, 449 U.S. 869 (1980); *Shahawy* v. *Harrison*, 778 F.2d 636, 640 (11th Cir. 1985) (rejecting the Tenth Circuit's narrower holding in *Crane* v. *Intermountain Health Care, Inc.*, 737 F.2d 715 (1980), see page 9, *infra*, and stating that "in this circuit Sherman Act jurisdiction requires a focus on the interstate markets involved in the defendant's business activities").

case more narrowly. The Tenth Circuit's decision in *Crane* v. *Intermountain Health Care, Inc.*, 637 F.2d 715 (1980), illustrates the latter view. The court held in *Crane* that the Sherman Act requires plaintiffs to show a "nexus * * * between interstate commerce and the challenged activity." *Id.* at 724. The court acknowledged that *McLain* had specifically relieved plaintiffs of having to make "the more particularized showing of an effect on interstate commerce caused by the conspiracy." *Id.* at 723 (quoting *McLain*, 444 U.S. at 242). In the Tenth Circuit's view, however, that language meant only that "an elaborate analysis of interstate impact is not necessary at the jurisdictional stage," but rather merely "an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce." 637 F.2d at 723. The Tenth Circuit also recognized that the Court in *McLain* had focused on "respondents' brokerage activities" in assessing the nexus with interstate commerce (*ibid.* (quoting *McLain*, 444 U.S. at 242)); but the court of appeals read that language to refer only "to the *challenged* activities, not the brokers' overall business" (637 F.2d at 723). Several other circuits, adopting the same rationale as *Crane*, have taken an equally narrow view of the *McLain* case. See, *e.g.*, *Stone* v. *William Beaumont Hosp.*, 782 F.2d 609, 613-614 (6th Cir. 1986) (opinion of Krupansky, J.); *id.* at 617-618 (Holschuh, J., concurring in the judgment); *Hayden* v. *Bracy*, 744 F.2d 1338, 1343 n.2 (8th Cir. 1984); *Furlong* v. *Long Island College Hosp.*, 710 F.2d 922, 925-926 (2d Cir. 1983); *Cordova & Simonpietri Ins.*

Agency Inc. v. *Chase Manhattan Bank N.A.*, 649 F.2d 36, 44-45 (1st Cir. 1981). See also *Seglin* v. *Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985).

We believe that those decisions reflect "a strained reading of the *McLain* opinion." *Stone* v. *William Beaumont Hosp.*, 782 F.2d at 622 (Martin, J., concurring in the judgment). *McLain* stated, in unmistakable terms, that a Sherman Act plaintiff "need not make the more particularized showing" of a nexus between the challenged activities and interstate commerce (see pages 7-8, *supra*); instead, the plaintiff need allege no more than a nexus between commerce and the line of business at issue. 444 U.S. at 242. The Court therefore looked to the brokers' overall business, concluding that their brokerage activities in general—and therefore the alleged anticompetitive commissions—fell within the ambit of the Sherman Act.

Judge (now Justice) Kennedy properly applied that "line of business" approach in his opinion for the Ninth Circuit in *Western Waste Serv. Sys.* v. *Universal Waste Control*, 616 F.2d 1094 (1980). The plaintiff in that case, a company engaged in the waste disposal business, sued another waste disposal firm for alleged antitrust violations. The court of appeals sustained the Sherman Act claim, holding that the plaintiff had sufficiently shown an effect on interstate commerce. Under *McLain*, the court explained, it was not necessary to show that the defendant's "alleged antitrust violations had a substantial effect on interstate commerce." *Id.* at 1096. Rather, the court noted, the plaintiff could go forward if it showed that the defendant's "rubbish collection business" substantially affected interstate commerce. *Id.* at 1097. The court of appeals held that that broader standard was met, particularly in light of the defendant's substantial purchases of out-of-state equipment. *Id.* at 1098.

3. Although we agree with the view of the Ninth Circuit—that the affected line of business may provide the nexus with interstate commerce—we also believe that, in an appropriate case, a plaintiff may base a claim on a still broader theory of the scope of the Sherman Act. On that view, the commerce requirement may be satisfied where a plaintiff shows that the generic class of economic activities that includes the line of business at issue is in or affects interstate commerce. That broader view is firmly rooted in this Court's decisions interpreting and applying Congress's power under the Commerce Clause.

With limited exceptions,[4] the Sherman Act applies to all activities within Congress's power under the Commerce Clause. "Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435 (1932). As the Court has explained, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944). Ac-

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[4] Congress has carved out some statutory exceptions from the reach of the Sherman Act. See, *e.g.*, Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (1982) (exception for state laws regulating the insurance business); 49 U.S.C. 11341(a) (1982) (exempting from the antitrust laws any carrier, corporation, or other person who participates in a consolidation approved by the Interstate Commerce Commission); Norris-La Guardia Act, 29 U.S.C. 101 *et seq.* (1982) (labor injunctions); Capper-Volstead Act, 7 U.S.C. 291-292 (1982) (agricultural cooperatives). In addition, this Court has adopted certain limiting constructions on the reach of the Sherman Act. See, *e.g.*, *Parker* v. *Brown*, 317 U.S. 341 (1943) (state action limitation); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (limitation for methods of petitioning the government for legislative change).

cordingly, "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' " *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945). See also *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. at 278; *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195 (1974); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940).

The power Congress possesses under the Commerce Clause is extensive. It reaches the farmer who grows wheat and bakes his own bread, because even this wholly intrastate activity can affect interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111 (1942). It reaches regulation of the price of intrastate milk sales, because those sales affect the price of interstate sales. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942). It reaches the local employment practices of employers whose goods later are shipped interstate. *United States* v. *Darby*, 312 U.S. 100 (1941). And it reaches the service of small family-owned restaurants and motels, because they may obtain food from out of state or serve interstate travelers. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). See also *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981) (commerce power allows Congress to protect "prime farmland" from damage); *Scarborough* v. *United States*, 431 U.S. 563 (1977) (commerce power allows Congress to forbid felons to possess guns that have ever traveled interstate); *United States* v. *Sullivan*, 332 U.S. 689 (1948) (commerce power allows Congress to prohibit relabeling of drugs after interstate shipment).

What is more, once a class of economic activities is found to affect commerce, Congress can regulate all of the activities of that class, even activities that do not separately affect commerce. The Court's decision in *Perez* v.

United States, 402 U.S. 146 (1971), explicitly illustrates the point. The petitioner in that case challenged his loansharking conviction, contending that the two extortionate loans he had made – for $1000 and $2000, respectively – did not affect interstate commerce, and therefore could not constitutionally be proscribed by Congress. This Court rejected that claim. "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 154. Thus, the Court explained, even if there is no "proof that the particular intrastate activity against which a sanction was laid had an effect on commerce," the sanction is nonetheless permissible if the intrastate activity falls within "*a class of activities* * * * properly regulated by Congress." *Id.* at 152. Applying that principle, the Court upheld petitioner's loansharking conviction. The Court noted that, however local the particular transactions might have been, they fell within the *class* of loansharking activity, and loansharking in the aggregate exerted a substantial impact on interstate business. *Id.* at 149-150, 154-157.

The Court unanimously applied the same "class of activities" test in *Russell* v. *United States*, 471 U.S. 858 (1985). The petitioner in that case was convicted, under 18 U.S.C. 844(i), for attempting to set fire to a two-unit apartment building that he had been using as rental property. Petitioner challenged his conviction, contending that the apartment building did not "affect[ ] interstate or foreign commerce" within the meaning of Section 844(i). 471 U.S. at 859. In rejecting that claim, the Court noted that the language of Section 844(i) "expresse[d] an intent by Congress to exercise its full power under the Commerce Clause" (471 U.S. at 859).[5] Moreover, the Court added,

[5] The Sherman Act, of course, uses language that is no less broad and, as we have recounted, has been similarly construed by this Court.

"[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class" (*id.* at 862). Because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties" (*ibid.*)—a market that Congress unquestionably had the power to regulate—the Court held that Congress likewise had the power to regulate activities with respect to an individual building. This Court in *Russell* thus explicitly applied the "class of activities" test to basically the same industry involved in *McLain*.

Because Congress' commerce power reaches any activity within a class of conduct that affects commerce, the Sherman Act likewise extends to any anticompetitive behavior within a class of commercial activity that affects interstate commerce. Under that view, even if the affected line of business is local, a plaintiff may nonetheless assert a Sherman Act claim if the class of activities within which the line of business falls affects commerce.[6]

4. An unduly narrow construction of the commerce requirement—one that requires a nexus between commerce and the challenged anticompetitive behavior—would unjustifiably impair antitrust enforcement efforts. There are substantial realms of antitrust enforcement where the line of business (or class of commercial activity) at issue manifestly affects interstate commerce, but the effect of individual transactions on interstate commerce, such as a particular rigged bid or price-fixed sale, can be traced only by arduous reconstruction and fine-grained

[6] See generally Mann, *The Affecting Commerce Test: The Aftermath of* McLain, 24 Hous. L. Rev. 849 (1987); Note, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121, 133-134 (1983).

analysis. Indeed, the reported cases show that certain conspiracies (such as rigged bids on school milk sales, rigged auction rings, rigged bids on local road building contracts, and rigged bids in small-scale military procurement) are a major and recurring concern precisely because, although the individual transactions are not large, the cumulative impact of such anticompetitive transactions in the industry can represent tens or hundreds of millions of dollars in losses for the public.

The government's investigation of the Florida milk market is one such example. To date, the United States has filed 18 cases, involving six companies and 13 individuals. It has collected $8,520,000 in fines, $3,785,150 in damages, and has secured terms of imprisonment for ten of the convicted participants.[7] Although price fixing in the milk market has, in the aggregate, significant interstate implications, cf. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942), the individual transactions typically involve local buyers and local sellers. The same holds true for aspects of the health-care industry. Here, too, the government has mounted aggressive efforts to curb such anticompetitive activities as collusive bidding, boycotts of individual practitioners and HMOs, and anticompetitive hospital mergers. See *Health Care Trends—U.S. Official's*

[7] See, *e.g.*, *United States* v. *Pippin*, No. TCR:89-04032 (N.D. Fla. Sept. 10, 1990); *United States* v. *Clark*, No. 90-41CRT10C (M.D. Fla. Feb. 9, 1990); *United States* v. *Mistler*, No. 89-219-CR-T-10B (M.D. Fla. Sept. 18, 1989); *United States* v. *Hallberg*, No. 89-130-13(A) (M.D. Fla. June 29, 1989); *United States* v. *Jackson*, No. 89-72CRT-13A (M.D. Fla. Apr. 18, 1989); *United States* v. *Tribble*, No. 89-21CRT(15)(C) (M.D. Fla. Feb. 22, 1989); *United States* v. *Garrett*, No. 88-385-CRT-13B (M.D. Fla. Dec. 22, 1988); *United States* v. *Tanna*, No. 88-203-CRJ16 (M.D. Fla. Nov. 21, 1988); *United States* v. *Howard*, No. 88-363-CRT17(C) (M.D. Fla. Nov. 15, 1988); *United States* v. *Hall & JTH Investment Co.*, No. 88-348CRT-10C (M.D. Fla. Oct. 26, 1988).

Views, 77 Trade Reg. Rep. (CCH) ¶ 50,025, at 48,601-48,607 (Nov. 14, 1989) (remarks of Robert E. Bloch).[8]

The precedents of this Court clearly establish commerce clause jurisdiction where the violation infects an activity or business that affects interstate commerce, or is part of a class of such activities or businesses that taken as a whole affect interstate commerce. In these circumstances, it is a pointless, expensive, and distracting expansion of litigation, and a waste of government and judicial resources, to insist on an elaborate particularized showing of a further nexus between the violation and interstate commerce. Such "complex preliminary issue[s]," which are "irrelevant to the liability of the defendant," sidetrack the trial from the substance of the lawsuit and consume resources better devoted elsewhere. *Kansas & Missouri* v. *Utilicorp United, Inc.*, 110 S. Ct. 2807, 2813 (1990). In this respect, as in other areas of antitrust law, it is best "to avoid weighing down treble-damages actions with * * * 'massive evidence and complicated theories.' " *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 741 (1977).

B. Under An Appropriately Broad View of Sherman Act Coverage, There Is A Sufficient Nexus To Interstate Commerce In This Case

In reviewing the grant of a motion to dismiss a complaint, "courts must accept as true all material allegations of the complaint, and must construe the complaint in favor

[8] Petitioners contend (Br. 15-20) that an expansive construction of the Sherman Act may thwart the peer review process, thereby jeopardizing the quality of medical care. We note, however, that Congress has largely abated that risk by providing, in 42 U.S.C. 11101 *et seq.*, that persons who follow certain specified peer review procedures shall be immune from damages under federal and state law, except for civil rights actions and parens patriae actions under 15 U.S.C. 15c. 42 U.S.C. 11111.

of the complaining party." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). All well-pleaded facts must be taken as true (see, *e.g.*, *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 411 (1986); *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984); *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974)), and reviewing courts may not affirm a dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' * * * dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co.* v. *Trustees of Rex Hosp.*, 425 U.S. at 746.

Under "this concededly rigorous standard" (*Hospital Bldg. Co.*, 425 U.S. at 746), respondent's interstate commerce allegations, particularly as supplemented by petitioners' representations in the court of appeals, pass muster—on either a "class of activities" or "line of business" approach to the commerce requirement.[9] Respondent identified a class of activities—the provision of ophthalmological services—out of which the challenged boycott arose. That class of activities, the complaint asserted, affects interstate commerce in several respects: physicians and hospitals receive reimbursement through federal Medicare payments (Compl. ¶¶ 24-26; Pet. App. A43); individual hospitals are often constituents of larger,

[9] Although we agree with the court of appeals' resolution of the inquiry, we think the proper question is not whether "the peer review process in general" affects commerce (Pet. App. A19), but whether the subject of the alleged conspiracy—hospital ophthalmological services in general or those of this hospital—affects interstate commerce. The alleged anticompetitive conduct did not tend to restrain the peer review process.

interstate operations (Compl. ¶ 6; Pet. App. A37); and reports concerning peer review proceedings are routinely distributed across state lines, thereby affecting the availability of employment opportunities on a nationwide basis (Compl. ¶ 124; Pet. App. A74-A75). Moreover, in their brief in the court of appeals, petitioners appear to have acknowledged that their particular line of business (*i.e.*, the ophthalmological services provided in this hospital)—if not the challenged conduct in particular—receives out-of-state patients, as well as out-of-state revenues. C.A. Br. 25. See also Pet. App. A19 n.6. On that record, the court of appeals correctly concluded that respondent had shown a sufficient nexus with interstate commerce to withstand the motion to dismiss.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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